

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

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In the Matter of)
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Limitations on Commercial)
Time On Television)
Broadcast Stations)

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

MM Docket No. 93-254

TO: The Commission

COMMENTS OF TRIBUNE BROADCASTING COMPANY

Tribune Broadcasting Company ("Tribune") submits these Comments in response to the Commission's Notice of Inquiry ("Notice") in this docket, 8 FCC Rcd 7277 (1993).¹

Tribune submits that the Commission need not tarry long with this Inquiry. Of all the national telecommunications policy issues demanding the Commission's attention and scarce resources, commercialization in television broadcasting should rank at or near the bottom. It is a regulatory field where market forces are working remarkably well.

For the reasons described below, Tribune believes there is no need for the Commission to even contemplate re-regulation of television advertising practices. There would be no rational policy basis for such action, programming innovations would be frustrated, and any quantitative rules probably would be struck down.

¹ Tribune, through subsidiaries, operates seven major-market television stations. Its Tribune Entertainment Company subsidiary has produced and syndicated information and entertainment programming to television stations since 1982.

A. There Is No Need to Limit Commercialization.

The Notice hits the mark in noting that "[a] policy that serves the needs of the public at one time may become anachronistic or burdensome at a later time." Id., ¶ 6. This was in fact the Commission's finding with regard to commercial time limits in 1984, when it repealed its commercialization processing guidelines and logging rules.¹ For the same reasons that persuaded the Commission a decade ago, efforts today to institute rules, guidelines or other regulatory measures limiting commercial time or advertising presentations in television broadcasting would be no less anachronistic and burdensome.²

Such regulation would be anachronistic because television has developed beyond the point, if there ever was one, where a federal policeman is needed to suppress the quantity of commercial matter. Broadcasters have long since learned that overlong or too-frequent commercial breaks disrupt program continuity, bore viewers and encourage them to tune elsewhere. This fact is more true today than it was in 1984. As Commissioner (then Chairman) Quello cogently observed in his

¹ Report & Order in MM Docket No. 83-670, 98 F.C.C.2d 1076 (1984) ("Television Deregulation"), recon. denied, 104 F.C.C.2d 357 (1986), *aff'd in part and remanded in part sub nom. Action for Children's Television v. FCC*, 821 F.2d 741 (D.C. Cir. 1987).

² These Comments, and the Notice, concern commercialization other than in programming specifically designed for young children.

separate statement accompanying the Notice: "The tyranny of the remote control provides an adequate check on broadcast stations that must increasingly compete for viewers."

(Footnote omitted).

Commercial television stations depend on advertising revenues to meet their budgets, pay their employees and discharge their public service obligations. Advertisers pay for viewing, and a television station's ability to deliver a portion of the increasingly fragmented viewing public to an advertiser depends on its ability to attract and hold its audience. There is no surer way to lose an audience than to clutter the television landscape with commercials. The Commission found in Television Deregulation that both audiences and advertisers were likely to avoid stations with excess clutter. 98 F.C.C.2d at 1105. That finding remains valid.

Tribune stations have not significantly increased the number of commercial minutes per hour since the 1984 Television Deregulation order. They remain within the 16 minutes per hour processing guidelines that were repealed in that proceeding as unnecessary because market forces were keeping stations, on average, well below 16 minutes. Id., 1102-03. Tribune stations have streamlined their programming flow by clustering commercials within (rather than between) programs, and keeping the number of announcements to a reasonable level, all in the interest of making the viewing experience as pleasant and uncluttered as possible. The fact that stations generally have

not increased commercialization after the Commission abandoned regulation in this area demonstrates that market forces continue to restrain commercialization.

The competitive arena in which television stations operate includes more than commercial broadcasters. Commercialization levels of cable program services, including premium (non-commercial) services, affect the public's sense of what "excessive" commercialization is. In addition, commercial broadcasters compete with "non-commercial" public television stations, whose underwriting announcements and other on-air practices often create as strong an impression of paid sponsorship as a commercial broadcaster's program fare.¹ The Commission found in 1984 that deleting its commercialization policies served the public interest because regulations would "interfere with the natural growth and development of broadcast television as it attempts to compete with future video market entrants." Id., 1104. The wisdom of this hands-off approach is even more evident now than 10 years ago.

Imposition of commercial-time regulations would be burdensome for broadcasters, with no corresponding public benefit. Commercial time could not be limited without rules defining what commercial time is. Should the "Budweiser Play of the Game" be treated as program matter or commercial? The Commission's old logging rules, repealed in 1984, required

¹ See "Media: Hi! You're Shopping Channel 11," Chicago Reader, Dec. 3, 1993 at 10, 32 (attached to these Comments).

broadcasters to make these sorts of fine distinctions. The Commission observed, in the Television Deregulation order, that its logging rules were "the largest government burden on business in terms of total burden hours." Id., 1106 (citing GAO report). Resurrecting such rules would guarantee work for communications lawyers, but would not benefit the public interest.¹

B. Limits on Commercialization Would Inhibit Innovation.

One of the intended consequences of the Television Deregulation decision was the advent of the infomercial. 98 F.C.C.2d at 1104. Program-length commercials enable viewers to learn more about a product than a 30- or 60-second "spot," while affording them time to consider the purchasing decision. Generally, these presentations also offer the opportunity to order the product, using a toll-free telephone number.

Political "infomercials" came into favor during the 1992 presidential campaign. Candidate H. Ross Perot frequently purchased blocks of program time from networks and local stations to address issues as length, avoiding the often-

¹ The Commission's experience under the Children's Television Act of 1990 illustrates this point. Despite the relatively small number of weekly program hours for which stations must count commercial minutes, the Commission has encountered numerous instances of misunderstanding and misinterpretation of the law. Expanded to the full broadcast day, and to the full panoply of commercialization practices, many of which are prohibited in children's programs, the monitoring and record-keeping task would become a taxing one. The public benefit from such an exercise would be virtually nil, given the market-place restraints that already operate.

criticized "sound bite" approach traditionally employed by candidates. Tribune submits that there is nothing unique about political advertising that should make the program-length commercial format appropriate to it alone, while disqualifying commercial products from long-form treatment.

Television stations, it must be emphasized, cannot survive without attracting audiences. Conventional infomercials typically draw very small audiences. And, given the importance to stations and advertisers of full-day viewing statistics such as a station's sign-on to sign-off share of audience, a station will hesitate to air many traditional infomercials. They divert most of the audience, which often is lost for succeeding program hours as well. To the extent the Commission deems it in the public interest to limit program-length commercials,¹ market forces, again, are acting efficiently.

The absence of commercial-time limits offers broadcasters the opportunity to experiment and innovate, which was another intended benefit of the Television Deregulation decision. Id., 1103-04. Tribune Entertainment Company currently is offering a program entitled "Can We Shop?!" that

¹ Tribune does not advocate such limits. The Commission recently held that stations whose program format consists predominantly of home-shopping presentations do not unfairly displace other potential users of the broadcast spectrum. Report & Order in MM Docket No. 93-8, 8 FCC Rcd 5321 at ¶ 12 (1993) ("Home Shopping"). A fortiori, the broadcast of isolated program-length commercials should not be considered an inappropriate use of the spectrum.

accomplished comedian and interviewer, the program will be designed to both entertain and sell merchandise. It will be aired by commercial stations nationwide, and will feature celebrity news and interviews, comedy and sales presentations. The program will offer viewers the opportunity to purchase products discussed on the program, through a toll-free telephone number.¹

The one-hour "Can We Shop?!" program will contain fewer minutes of commercial announcements (10 per hour) than most stations now air in other program hours. Because these commercial announcements will be sold, as noted above, based on the size of the viewing audience, the program's success will depend on its attractiveness as *programming*, not simply as advertising. Innovative programs such as "Can We Shop?!" are as worthy of the Commission's protection as other commercially-sponsored entertainment programming. Most certainly they should not be restricted or curtailed, after the fact, by FCC rule.²

¹ The opportunity to purchase is the major respect in which "Can We Shop?!" will differ from many popular talk and variety shows. Typically, celebrity guests appear for interviews on these programs for the primary purpose of promoting (*i.e.*, selling) their latest movie, book, record album, play or television show.

² The Commission found, in its Home Shopping order, that such programming provides valuable services to "the disabled and other[s] confined to their homes, the elderly, families without time to shop by other means, people without ready access to retail outlets or whose outlets do not stock the goods they want, people without cars or other transportation, people who dislike shopping, and people who are afraid of violent crime in conventional shopping areas." Id., 8 FCC Rcd 5321 at ¶ 28.

**C. Quantitative Commercialization Regulations
Would Be of Doubtful Validity.**

Tribune does not intend to present a comprehensive analysis of the constitutionality of quantitative rules limiting commercialization by television stations. Suffice it to say that under the current standards applicable to restraints on commercial speech, such regulations would not pass muster under the First Amendment.¹

In the 1984 Television Deregulation order, the Commission found "convincing evidence that marketplace forces can better determine appropriate commercial levels than our own rules." 98 F.C.C.2d at 1102. There is no evidence that the situation has changed. The Commission in 1984 intended to create the opportunity for more detailed commercial formats and other innovative program types, and that has occurred. It in-

¹ Under the Supreme Court's test in Central Hudson Gas & Electric Corp. v. Public Service Commission, 447 U.S. 557 (1980), non-misleading speech concerning lawful activities may be regulated only if the government has a substantial interest in the asserted restrictions, the restrictions advance the government's substantial interest, and the restrictions are no more extensive than necessary to serve the interest. Id., 564-66. "This burden is not satisfied by mere speculation or conjecture; rather, a governmental body seeking to sustain a restriction on commercial speech must demonstrate that the harms it recites are real and that its restriction will in fact alleviate them to a material degree." Edenfield v. Fane, 113 S. Ct. 1792, 1800 (1993). The Commission suggests no basis in the Notice, let alone a substantial one, for reimposing commercial limits. And, while the Supreme Court has recognized that "much advertising is 'tasteless and excessive,'" Carey v. Population Services International, 431 U.S. 678, 701 and n.27, quoting Virginia State Board of Pharmacy v. Virginia Citizens Council, 425 U.S. 748, 765 (1976), it has never upheld advertising restrictions on this ground.

tended to allow television stations to compete more effectively with other, unregulated media, and that has occurred.

The absence of regulation has not produced a rush to commercialize, or abuses of any sort. As the Court of Appeals has instructed, "regulation perfectly reasonable and appropriate in the face of a given problem may be highly capricious if that problem does not exist." Home Box Office, Inc. v. FCC, 567 F.2d 9, 36 (D.C. Cir. 1977) (per curiam), quoting City of Chicago v. FPC, 458 F.2d 731, 742 (D.C. Cir. 1971).

CONCLUSION

The Commission correctly concluded that a problem did not exist when it deleted its commercialization processing guidelines in 1984. Tribune submits that there is no basis for the Commission to change its views now.

Respectfully submitted,

TRIBUNE BROADCASTING COMPANY

By 

Charles J. Sennet
435 N. Michigan Avenue
Chicago, Illinois 60611
(312) 222-4121

Its Attorney

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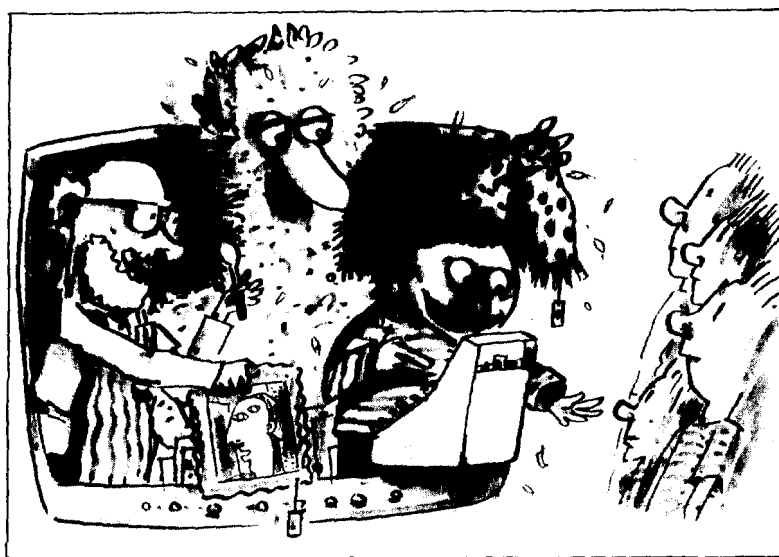
Media: Hi! You're Shopping Channel 11!

By Ted Shen

For two weeks in October it looked as if the Home Shopping Network had taken over Channel 11. Instead of detective Hercule Poirot, food impresario Jeff Smith, and naturalist Marty Stouffer, a succession of sincere-looking young men and women monopolized WTTW's airtime on Saturday and Sunday afternoon and after ten on weeknights, earnestly peddling one item after another. But they weren't hawking cheap zircon necklaces or Diane Von Furstenberg's downscale fall collection. They were selling attractive souvenirs from several of the city's beloved major cultural institutions. If you wanted a Chicago Symphony Orchestra silk scarf or an Art Institute Picasso poster, the salespeople politely urged you to dial the phone number at the bottom of your TV screen so that a helpful volunteer could take your order.

The *Holiday Gift Exchange Program*, as this sell-athon was artfully billed, seemed like a baby boomer's dream. But what was it doing on a public broadcast station? And did WTTW breach the public trust in airing what amounted to more than 40 hours of commercials on behalf of other not-for-profits?

"It's an outrage!" fumes Gigi Sohn of the Media Access Project, a Washington, D.C., watchdog group and public-interest law firm. "What they did was a flagrant violation of the public interest. They used the public airwaves, which were set aside for public education, to sell commercial goods. Don't they know that making money and the public interest are mutually exclusive? The FCC ought to punish them for this



Illustration/Peter Hannon

Did WTTW breach the public trust in airing more than 40 hours of commercials on behalf of other not-for-profit organizations?

conduct."

She has a point. The FCC bars broadcasters who hold noncommercial licenses from selling products. Public stations like WTTW are allowed to raise money for their own operations, but are explicitly forbidden to do so for other organizations. A 1984 FCC administrative ruling states, "Fundraising activities which significantly alter a station's normal programming, including auctions, marathons, membership drives, etc. should be carried for the benefit of the station only, and not for other organizations."

The language of the law seems straightforward, but Bruce Marcus, Channel 11's senior vice president for corporate marketing and communication, gives it a different spin. "First of all, we consider the *Holiday Gift Exchange Program* to be regularly scheduled programming,"

he explains. "We notified our viewers ahead of time, so they knew what to expect. The program was not an auction, or a marathon, or a pledge drive. It was educational and entertaining. We didn't break any rules." Indeed, the selling of the merchandise—most items priced between \$35 and \$100—was accompanied by slick promotional clips introducing the latest offerings from the CSO, the Art Institute, the Field Museum, the Lincoln Park Zoo, and WTTW itself. "We exposed the cultural riches of the city to a wide audience. That was a main criterion," Marcus points out. "Believe me, we had a lot of discussions internally about going ahead with this concept. We didn't want to disrupt people's viewing habits, so we didn't preempt prime time or kids' programs. We looked at where TV is going in the future, with the advent of Home Shopping

and QVC. We're always under pressure to find new ways of making money."

There's no doubt that home-shopping services are becoming a potent force in the TV business. Pitching products directly to a vast viewership is part of the interactivity pundits are predicting for the brave new world of convergence, in which fiber-optic lines, cellular and computer technology, and virtual reality pave the superhighways through which information travels. The profits can be enormous, which is why the stock of Home Shopping Network quintupled in a few short years. It's also why Barry Diller, who used to run Fox Network, bought a stake in QVC and now runs the home-shopping giant, the only rival to Home Shopping Network. And why QVC, still a novice in the media business, is able to line up blue-chip corporate partners in its hostile

takeover bid for Paramount Communications. WTTW has seen the future.

It has also stepped into murky legal waters. "From what I read, I believe the station did violate our regulation," says Roger Holberg, a spokesman for the FCC. "However, we really can't do anything until we receive a complaint from consumers or from our field office." (WFMT, as many listeners know, runs annual radiothons for the CSO and Lyric Opera, but it holds a commercial license and is not affected by the nonprofit status of its parent organization, the Chicago Educational Television Association, which also owns WTTW.)

According to some media-law specialists, WTTW's case, if it had one to begin with, is further weakened by a recent precedent. Earlier this year KSNJ, the dominant public-radio station in Minneapolis, requested a onetime waiver from the FCC to run a daylong fund-raiser for the Saint Paul Chamber Orchestra. After considering the orchestra's dire financial situation and its longtime association with the station, the FCC granted a "special and unique" waiver. "Which offers a compelling argument that 'TTW should've asked the feds' approval first," says a local broadcast lawyer who asked not to be identified. "The fact they didn't is going to look bad if the case is heard by the commissioners."

"Well, I think it's more correct to say that we were testing uncharted waters," says Marcus. "No, we didn't notify the FCC. We didn't think it was necessary. The program was to be a two-week test, an experiment to see if there's a need for this type of home shopping that also helps out cultural institutions in Chicago." WTTW, under CEO Bill McCarter, is one of the best run and most lucrative public stations in the country and has always been on the lookout for new sources of financial support. A decade ago it participated in public TV's brief experiment with on-air advertising, which was sanctioned by the FCC. It was among the first to air regular commercials during program breaks. Sticking largely to noncontroversial programming, it

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has also won over an inordinate number of corporate and individual benefactors. With home shopping it could capitalize on its tony image and well-to-do audience.

Demographic reports on TV-shopping trends indicate that more and more busy professionals are buying higher-quality merchandise on the shopping channels. In fact, department stores such as Macy's and catalog powerhouses such as Spiegel are creating their own

home-shopping services. WTTW could carve out its own profitable niche by cornering the museum-orchestra-zoo gift market. Carried on about 220 cable systems, it could reach as many as six million fans of *Masterpiece Theatre*.

According to Marcus, Channel 11 took a cut of the gross sales from the *Holiday Gift Exchange Program*. Part of that money covered the cost of running the program, and the rest went into the station's general coffers. Marcus can't disclose the final sales figures yet, though he says, "We're happy with the results. They went beyond our expectations." Among the best-sellers were reproductions of African masks on display at the Field Museum, a "rain-forest preservation kit" from the zoo, and Beethoven afghans from the CSO. Marcus credits the program's success partly to the soft-sell approach: prices and shipping costs didn't flash continuously on the

screen, there weren't incessant counts of how many items remained, and the salespeople didn't clown around.

So far, the station has gotten more than 300 calls about the program. "About half were queries about some of the products," says Marcus. "One-third were complaints about preempted programs. Only a tiny minority questioned whether we should have aired the program in the first place."

At least two or three organizations and a few individuals are contemplating action against the station, according to Andy Schwartzman, a colleague of Gigi Sohn's at the Media Access Project. "We're seriously examining the options," he says. "One client will definitely file a complaint with the FCC, which shouldn't have allowed this to happen in the first place. 'TTW is unbelievably arrogant, but it does have powerful friends in Washington, people like Newton

Minow." Minow is a public-broadcast innovator who's also a partner specializing in media law at Sidley & Austin.

If the FCC commissioners find that the station violated FCC rules, it is likely to get a reprimand. "It could be a gentle slap on the hand or a serious look at the station's management when its license comes up for renewal," explains David Haddock, who teaches broadcast law at Northwestern University's law school. "The FCC only rarely revokes a license for this kind of situation. Besides, speaking for myself, I'm all for fund-raising that keeps my favorite PBS programs on the air."

But Sohn fervently believes that it's the management's duty to keep a PBS station afloat without defying its public mandate. "If they can't make a go of it, then let somebody else do it," she says. "The public broadcasting system is definitely not the place for home shopping. And

what TTW did was to sell products, no matter what they chose to call it."

Of course, WTTW might ask for a change in the FCC's rulings, but the deliberation process, certain to involve consumer advocates as opposition, could take years. And the regulation-minded Clinton administration reportedly doesn't want to jeopardize its telecommunications agenda by letting educational TV take off in a new direction. In any case, the honchos at WTTW have other alternatives. "Depending on the audience feedback and the sales results," says Marcus, "the gift-exchange show may return in a different format. We may carry it again, or we may go to cable. We can syndicate the service as a national show for nonprofit cultural institutions all over the country." Clearly the heated debate over the role of public stations in a media world that's rapidly being reconfigured will continue.